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February 25, 2021

By ECF

The Honorable Gregory H. Woods
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street, Room 2260
New York, NY 10007

Cardwell v. *Davis Polk & Wardwell LLP,* et al.
No. 1:19-cv-10256-GHW (S.D.N.Y.)

Dear Judge Woods:

We represent defendants in the above-captioned matter. We write in response to plaintiff's February 17, 2021 letter (ECF 152), in which he seeks leave to amend his complaint yet again.

As an initial matter, plaintiff's letter fails to comply with the relevant procedural requirements. "It is well-settled that when seeking leave to amend, the movant must submit 'a complete copy of the proposed amended complaint . . . so that both the Court and the opposing party can understand the exact changes sought.'" *S.M.* v. *Oxford Health Plans (N.Y.), Inc.*, 94 F.

Supp. 3d 481, 515 (S.D.N.Y. 2015), *aff'd*, 644 F. App'x 81 (2d Cir. 2016) (quoting *Akran* v. *United States,* 997 F. Supp. 2d 197, 207 (E.D.N.Y.), *aff'd,* 581 Fed. Appx. 46 (2d Cir. 2014)).[1]

Plaintiff has not complied with this requirement. Moreover, when defendants, having received plaintiff's deficient February 17 filing, asked plaintiff to send a copy of the proposed amended complaint and a redline against the operative version, he refused to do so. Courts confronted with motions that "fail[] to attach any proposed amended complaint" deny leave to amend on the grounds of prejudice to the non-moving party. Defendants respectfully request that the Court do the same here. *American Tissue, Inc.* v. *Donaldson, Lufkin & Janrette Securities Corp.*, 233 F.R.D. 327, 329 (S.D.N.Y. 2005).[2]

Plaintiff's effort to amend the complaint for a third time, at the close of fact discovery, and despite a pending motion to dismiss the prior amended complaint after full briefing, should also be rejected for several additional reasons.

First, from what one can glean from plaintiff's February 17 letter, plaintiff's proposed amendments—which appear poised to excerpt selectively, and self-servingly, from a significant volume of documents produced in discovery—serve no purpose other than to place in the public record plaintiff's characterizations of small amounts of discovery material. This is not the function of an amended complaint under the federal notice pleading standard, and amendment is not necessary to prosecute plaintiff's case. *E.g.*, Fed. R. Civ. P. 8(d) ("each allegation must be simple, concise, and direct") (emphasis added). Courts deny leave to amend where amended pleadings serve no purpose, risk creating inefficiencies and delay, or otherwise violate Rule 8.[3]

Second, to the extent plaintiff seeks to add new claims or parties, he is far too late.[4]

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[1] *Accord Gulley* v. *Dzurenda,* 264 F.R.D. 34, 36 (D. Conn. 2010) (citing 3 James Wm. Moore et al., *Moore's Federal Practice* ¶ 15.17[1] (3d ed. 2004)) ("To obtain leave of court to amend the complaint, a party should file both a Rule 15 motion and a proposed amendment or new pleading."); *Cotto* v. *City of New York*, No. 16-cv-8651 (NRB), 2018 WL 3094915, at *2 (S.D.N.Y. June 20, 2018) (same).

[2] Any claim that plaintiff's failure to attach a proposed amended complaint is not prejudicial is meritless; plaintiff has made clear that the letter he submitted offered only "an overview of the types of allegations Plaintiff would add if granted leave to amend," and the letter, while setting forth various theories about evidence, does not explain the specific amendments he would make—or how many of them he would make. ECF 152 at 1 n. 4. Plaintiff's operative complaint—already amended twice in substance—is already 170 pages and 637 paragraphs long, with 19 exhibits. When previously granted leave to amend, plaintiff added not incremental changes but 350 paragraphs and 83 pages.

[3] *White* v. *Smith*, 2018 WL 8576594, at *9 (N.D.N.Y. Dec. 12, 2018) (finding that proposed amendment "certainly runs afoul" of Rule 8's "short and plain statement" requirement "by adding unnecessary details and arguments in an attempt to bolster his claims"), *report and recommendation adopted as modified sub nom., White* v. *Marinelli*, 2019 WL 1090802 (N.D.N.Y. Mar. 8, 2019); *Johnson & Johnson* v. *Guidant Corp.*, 2010 WL 571814, at *10–11 (S.D.N.Y. Feb. 16, 2010) (denying leave to amend where proposed amendment seeks to "add unnecessary allegations" to "bolster" plaintiff's claims and would "unnecessarily delay the case").

[4] Plaintiff claims he does not intend to add new claims or parties, but concedes that he has included in his letter only an "overview of the types of allegations" he seeks to add, ECF 152 at 1 n. 4, and has already once in this litigation added a new legal theory he was not given leave to add.

Third, plaintiff's request represents an improper attempt to circumvent a pending motion to dismiss. Granting plaintiff leave to replead "would moot the defendants' motion to dismiss and render wasted the expense of filing that motion"; to "allow the plaintiff to amend the current complaint repeatedly when challenged with a motion to dismiss would promote wasteful motion practice." *Williams* v. *Rosenblatt Sec. Inc.*, 2016 WL 4120654, at *6 (S.D.N.Y. July 22, 2016) (denying leave to amend). Plaintiff has already been permitted to amend twice, the last time with an admonition from the Court that he "should not expect any additional opportunities to amend his complaint." ECF 78 at 79. "Justice" does not "require" permitting a plaintiff to amend a complaint after each document production. Fed. R. Civ. P. 15(a)(2). And "defendants and the Court cannot be expected to deal with a constantly shifting target, as plaintiff revises and re-revises its claims." *American Tissue, Inc.*, 233 F.R.D. 327 at 330.

In any event, plaintiff's assertion that newly-produced discovery justify, or even demand, amendment are baseless. None of the "inferences" he claims are revealed in the documents requires amendment.

- Plaintiff's invocations of actions by the Firm and the Management Committee Defendants are irrelevant; defendants have not moved to dismiss those claims.[5]

- Plaintiff's continued refusal to accept that Ms. Hudson viewed him as "behind" his class does not merit amendment, and his purported invocation of evidence is reminiscent of the demonstrably false allegations this Court has already needlessly had to devote resources to address.[6]

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[5] Plaintiff's characterizations of the evidence are also self-serving and misleading. For instance, plaintiff contends that Mr. Bick gave "instructions" on June 13, 2016 to solicit reviews for Mr. Cardwell in June 2016 and that this "flatly contradicts" defendants' assertion that plaintiff requested this feedback. Not so: a document dated June 10, 2016 and presented to Mr. Bick shows that plaintiff was viewed as potentially "behind" his class and had requested "more" performance evaluations. DPW-SDNY-00140609 *et seq*. (The document also noted that there had been "difficulty staffing him in Capital Markets based on performance issues." *Id.*)

Plaintiff's selective excerpting of the record, here and as to Ms. Hudson (see note below), suggests an effort purely to harass and cause unnecessary delay and needless motion practice, particularly given that documents known to plaintiff make clear that his novel contentions lack evidentiary support.

Plaintiff's claim that a "full version" of Mr. Smith's final 2018 performance review has not been produced could have been resolved by a call to counsel; it appears at DPW-SDNY-00144391–00144394.

[6] For instance, plaintiff claims that Ms. Hudson's June 2016 review "**marked for the first time** that a Davis Polk partner claimed in a performance review that any partner of the Firm had concluded Cardwell was **so-called 'behind.'**" Pl. Ltr. at 2 (emphasis added). In fact, Mr. Chudd's September 2015 review uses that exact word in connection with plaintiff's performance; the full text of his review is below.

Likewise, plaintiff appears to suggest that Ms. Hudson's request to see plaintiff's reviews was somehow related to her "completing [her] performance review" in June 2016. Plaintiff omits that Ms. Hudson made this request in November 2015, prompted by events known to plaintiff—and, of course, that his contemporaneous, handwritten notes from 2016, before he decided to sue her, describe Ms. Hudson as "particularly good at giving feedback."

Lest Mr. Chudd's review be excerpted in misleading part, the full text, dated September 2015—prior to Ms. Hudson's reviews—is here: "I did not have much direct interaction with Kaloma on the [*redacted*] transaction.

- Plaintiff's allegations with respect to Mr. Brass likewise border on the defamatory; Mr. Cardwell has been given material in discovery establishing that Mr. Brass confirmed in writing that Mr. Cardwell did not have skills in the task necessary for the particular assignment, and that plaintiff has specifically taken out of context the language quoted in his February 17 letter. *See PI, Inc.* v. *Quality Prod., Inc*., 907 F. Supp. 752, 764–65 (S.D.N.Y. 1995) (denying leave to amend where "timing demonstrates that it is clearly a dilatory tactic to avoid dismissal of this action").

Fourth, plaintiff's serial motion practice—which repeatedly forces defendants into costly rounds of correspondence and briefing, up to and including this request—is abusive and wasteful and does not advance the prompt resolution of claims as provided under the Federal Rules. A further amendment at this juncture would delay discovery (which cannot proceed to completion without an operative pleading), extend the timetable for briefing and resolution of defendants' motion to dismiss, and further delay moving this case toward resolution.

For all these reasons, defendants respectfully request that the Court deny plaintiff's request. To the extent the Court wishes to hear more on this subject, defendants would request that the Court schedule a pre-motion conference in the hopes of avoiding the need for further costly and unnecessary motion practice.

Respectfully submitted,

/s/ Bruce Birenboim

Bruce Birenboim

cc: Counsel of Record (*Via ECF*)

That said, we were very stretched on the transaction, and the impression I got from the team was that they did not have confidence that Kaloma could interact directly with the client (as much as, for instance, some of the other first years could). Also, my understanding was that he was not yet able to take the lead on the diligence report, while another first year could take the lead (and that his due diligence summaries needed quite a bit of work). For this reason, my impression is that Kaloma may be '**behind**' in his class, although because my impression is based off of third party accounts, I do not feel totally confident with this determination."